

PATENT

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**First Named Inventor:
Mark Bradford Keener**

Confirmation No.: 9290

Serial Number: 10/625,878

Examiner: NGUYEN, Tan D.

Filed: July 24, 2003

Group Art Unit: 3689

**Entitled: METHOD AND SYSTEM
FOR DELIVERY OF
INFRASTRUCTURE
COMPONENTS AS THEY
RELATED TO BUSINESS
PROCESSES**

Attorney Docket Number: 1400.002

**MAIL STOP APPEAL BRIEF - PATENTS
BOARD OF PATENT APPEALS AND INTERFERENCES
PO Box 1450
Alexandria, VA 22313-1450**

APPEAL BRIEF

In response to the Notice of Panel Decision from Pre Appeal Brief Review, having a shortened statutory period for response set to expire 60 days from the Notice of Appeal, which was filed December 31, 2008, which is set to expire on February 27, 2009. Applicant respectfully requests entry and consideration of the following amendments and remarks.

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REQUIRED FEE

The require fee accompanies this case under authorization to charge the Deposit account 50-1313 of the Buskop Law Group, the appropriate fee.

TIME PERIOD

This appeal brief is filed within the time period as given in the Notice of Panel Decision from Pre-Appeal Brief Review mailed January 22, 2009 and 60 days from the Notice of Appeal filed December 31, 2008, whichever is longer.

STATEMENT OF THE REAL PARTY IN INTEREST

The real party in Interest is the inventor, Mark Bradford Keener.

STATEMENT OF RELATED CASES

The following pending litigation would be directly affected by the Board's decision in the appeal:

CAUSE NO. 2007-67481

JOSEPH M. HILL, AS CHAPTER 7	§	IN THE DISTRICT COURT OF
TRUSTEE of the ESTATE OF MARK &	§	
ROBIN KEENER	§	
PLAINTIFF,	§	
	§	HARRIS COUNTY, TEXAS
v.	§	
	§	
BMC SOFTWARE, INC.	§	
DEFENDANT	§	215 TH JUDICIAL DISTRICT
	§	

November 1, 2007 above lawsuit was filed in Texas state District Court
November 30, 2006 Defendant removed to Federal Court.
April 2, 2008 Federal Court Orders Remanded case to State Court.
May 15, 2008 Appeal of Defendant's was dismissed by Federal Court Order.

Case is still pending with claims for theft of trade secret and patent
infringement and copyright infringement claims.

JURISDICTIONAL STATEMENT

The statute under which the appeal is taken is 35 USC. 134.

Applicant is submitting this appeal brief in accordance with 37 CFR 41.31-
37 as enacted December 10, 2008 as published in the June 10, 2008 Federal
Register Vol. 73, No. 112 pages 32938 to 32977.

The mailing date of the Office action setting out the rejection from which the
appeal is taken is October 07, 2008 which was a final office action.

A Notice of Appeal requesting pre-appeal brief review was filed December
31, 2008.

A Notice of Panel Decision from Pre-Appeal Brief Review was mailed
January 22, 2009.

The date on which the appeal brief is being filed is February 26, 2009.

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TABLE OF AUTHORITIES (alphabetically arranged)

Cases with page reference in this Brief.

EWP Corp v. Reliance Universal, Inc 755 F.2d 898 (Fed Cir. 1985).

Ex parte Remark 15 USPT2d 1498 (Bd. Pat. App. & Inter. 1990).

Graham v. John Deere Co., 383 U.S. 1, 148 USPT 459 (1966).

Statutes with page reference in this Brief

35 USC § 103(a)

35 USC Section 112

35 USC § 120

35 USC § 134

Other authorities with page reference in this Brief.

37 CFR Section 1.132.

STATUS OF AMENDMENTS

Claims 1 and 4 - 27 are currently pending in the Application.

Applicant amended Claim 1 as of June 25, 2008 which was entered as stated in the Office Action of October 07, 2008.

GROUND OF REJECTION TO BE REVIEWED

1. FIRST GROUND

The Office Action rejected Claims 1 and 4 – 27 under 35 USC § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter application regards as the invention. In claim 1, elements (f), sub-elements (i) – (xiii) are vague because it's unclear whether the data/program of (i)-(xii) are being used?

2. SECOND GROUND:

The Office Action rejected Claims 1 and 4 – 27 under 35 USC § 103(a) as obvious in view of ADLER (US Patent Application Publication No. 2002/0169658).

STATEMENT OF FACTS

The patent application was filed July 24, 2003, which claimed priority to US Provisional Application No. 60/399,795 filed on July 31, 2002. This case has been pending for 7 years.

Applicant submitted a Preliminary Amendment amending the claims 1 – 17 and cancelling claims 28 - 39 on August 16, 2005 due to a clerical error in a portion of the preamble of claim 1.

Another Preliminary Amendment was filed on September 19, 2005 amending the preamble of claim 1 to remedy the clerical error.

A Notice of Acceptance of Power of Attorney was mailed from the USPTO on September 26, 2005.

A Non Final Office Action was mailed April 25, 2008, with the following rejections:

(a) claims 1 - 27 under 35 USC Section 101,

(b) claims 1 - 27 under 35 USC Section 112,

(c) claims 1 - 27 under 35 USC Section 102(b) as anticipated by or, in the alternative under 35 USC Section 103(a) as obvious over LAKIS (US Patent No. 5,864,865);

(d) claims 1 - 27 under 35 USC Section 102(a) as anticipated by or in the alternative under 35 USC Section 103(a) as obvious over CARD ET AL (US Patent Application Publication No. 2003/0085931);

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(e) claims 1 - 27 under 35 USC Section 102(a) as anticipated by or in the alternative under 35 USC Section 103(a) as obvious over HILL (US Patent No. 6,670,973); and

Japanese reference 408329156A was made of record.

Amendment and Response to the Office Action of April 25, 2008 was filed June 25, 2008 amending claim 1 and cancelling claims 2 and 3.

A Final Office Action was mailed October 07, 2008 entering amended claim 1 and continuing the rejection under 35 USC Section 112, for claims 1 and 4-27, but adding a New Ground(s) of rejection under 35 USC Section 103(a) for claims 1 and 4 – 27 citing NEW REFERENCE – ADLER (US Patent Application Publication No. 2002/0198727) and noting on page 7 that this was a new ground(s) of rejection.

A Notice of Appeal and a Pre-Appeal Brief Request for Review were filed December 31, 2008. The Brief discussed Adler which was a new reference and new ground(s) of rejection. The Brief also discussed the 35 USC Section 112 rejection.

Applicant's invention as stated in the brief teaches:

a “device adapted for manipulating data and programs” - (“input device” and “computer” in case as filed);

a “processor with data storage”- (“computer” in case as filed);

a “device adapted for inputting data and programs” - see Claim 1 paragraph (f), as previously amended, and Claims 25 and 27, as filed (“input device”);

a “device adapted for viewing data and programs” - (“input device” and “computer” as stated in case as filed);

“user input device” – see Claim 1 paragraph (e), as previously amended (“user interface executable on a user input device”);

“network” – see Paragraph [00040], and Figure 1 depicting a “shared network object layer and a network object layer;”

“computer instructions for...” – see Paragraphs [0025], [0028], and [0052], teaching use of software using “dependency and impact hierarchy” – see Figure 1

On January 22, 2009, the Notice of the Panel Decision from the Pre-Appeal brief was mailed to Applicant saying the case would proceed to the Board of Patent Appeals and Interferences for claims 1 and 4-27.

A litigation was started between Applicant and BMC Software of Houston ,Texas, on the basis of theft of intellectual property as noted in the related section above and the case is still pending. The subject matter of this patent application is

the technology of that litigation, the subject matter of the theft of intellectual property claim.

ARGUMENT

Applicant's claim 1 teaches a unique process for evaluating the infrastructure of specific business processes through the creation of layer dependency impact hierarchical models.

Claim 1 was amended, in the response to the office action dated April 25, 2008, to overcome the Section 112 objections and add "a device" to each of sections (a), (b) and (c) of Claim 1.

Additionally, claim 1 was amended and has a thirteen layer dependency/impact hierarchical model that represent individual technical infrastructure components as they relate to individual business processes.

Applicant's claimed invention provides a unique process for evaluating the infrastructure of specific business processes through the creation of layer dependency/impact hierarchical models.

The invention provides a significant advantage over the prior art, in that, the models are evaluated to readily and easily identify the value of services and technical infrastructure components relative to the value of the core business they support (Applicants Specification, Paragraphs [0008 and 0009]).

Applicant's claims teach a system that includes devices for manipulating data, inputting data, and viewing data, a user input device, and a network, wherein the device for manipulating data comprises computer instructions for identifying relationships between business processes and technology using a protocol to form a dependency and impact hierarchy.

Applicant's system includes numerous object layers, which are arranged vertically, creating vertical dependencies, and which are in a constant and static arrangement. (Applicant's Claim 1, as previously amended)

Applicant's system creates a thirteen layer dependency/impact hierarchical model that represents individual technical infrastructure components as they relate to individual business processes.

Applicant's model considers every technical infrastructure component necessary to support any specific business activity, creating a resulting hierarchy that describes inter-dependences between various technical infrastructure components and their impact on business processes (Applicant's Paragraph [0008]).

In sharp contrast, *Adler* is directed to a system and method for predicting outcomes of business decisions by simulating various decisions over time under varying assumptions about the market and the overall economy (*Adler*, Paragraphs [0002]-[0005]). Applicant's claimed invention is not concerned with making predictions.

In contrast to *Adler*, Applicants claimed invention is directed to evaluating infrastructure in order to make informed organizational decisions and process changes. The claimed invention is not concerned with changing or modifying businesses goals and decisions, but with evaluating the current underlying infrastructure and technology in relation to the existing business models.

Applicant's claim 1 requires "the device adapted for manipulating data and programs comprises computer instructions for identifying relationships between

business processes and technology using a protocol to form a dependency and impact hierarchy.” There is no teaching or suggestion found in *Adler* for a protocol for forming a dependency and impact hierarchy.

Adler’s Figure 12 illustrates a screen shot for a simulation subsystem (*Adler*, Paragraph 0087). There is no teaching or suggestion contained within the figure or the associated text for a protocol used to form a dependency and impact hierarchy, nor is there even a teaching or suggestion to form a dependency and impact hierarchy. Instead, *Adler’s* Figure 12 provides a screen shot of the GUI for a simulation subsystem used to run the disclosed simulations (*Adler*, Paragraph [0085]).

Each of *Adler’s* figures 3, 5A, and 12 fail to teach or even suggest the protocol for forming a dependency and impact hierarchy for identifying relationships between business processes and technology.

Applicant teaches a dependency and impact hierarchy is representation of specific technical infrastructure components and their relationship to individual business processes (Applicants Original Specification, Paragraph [0015]).

In contrast, *Adler’s* Figure 3 illustrates the interconnection of a set of tools for creating, running and evaluating a simulation (*Adler*, Paragraph [0079]). *Adler’s* Figure 5A represents the potential service offerings available in the E-market place (*Adler*, Paragraph [0111]). *Adler’s* Figure 5A merely provides a representation of goods and services companies can offer, and the interrelation of those good and services. Further, *Adler’s* figures are not concerned with the infrastructure of a business.

Adler does not teach or even suggest identifying the relationships between business processes and technology, and there is certainly no protocol to form a dependency and impact hierarchy.

The novelty of Applicant's invention appears in claim 1, which requires "the object layers [being] arranged vertically creating vertical dependencies and the object layers are in a constant and static arrangement." While the final rejection characterizes *Adler's* Figures 4, 5A, and 12 as showing "layers," these figures fail to illustrate or even suggest layers.

Instead, *Adler's* figures model the interaction of the systems used in *Adler* for simulating the consequences of business decisions. Therefore, each of *Adler's* figures fail to disclose or even suggest layers, like the thirteen vertical layers of Applicant's claimed invention which form the dependency and impact hierarchy.

Further, *Adler* fails to disclose any object layers arranged vertically creating vertically dependencies as required by claim 1. However, the Applicant's layers are a descriptive functional element because the arrangement is based on dependencies and each layer positively serves the function of storing data. This is in sharp contrast to functional non-descriptive material which includes music or a literary. Therefore, Applicant believes the previous Office Action was in error not to giving patentable weight to "the object layers [being] arranged vertically creating vertical dependencies and the object layers are in a constant and static arrangement."

The claimed invention is concerned with the organization, technology and infrastructure of a business or related businesses. The claimed invention is not concerned with the market or creating simulations in order to predict the results of

a course of action.

Applicant's invention relates to optimizing the current business practice of an entity. The claimed invention does so, through a protocol which is used to form a dependency and impact hierarchy. Applicant's claimed invention is vastly different from the method and system disclosed by *Adler*, and Adler fails to teach or even suggest those limitations required by the claimed invention.

Claims 1, 4-27 were rejected under 35 USC 112. Specifically, element (f), sub elements (i)-(xiii), were rejected as vague alleging it is unclear whether the data of (i)-(xiii) is being used.

However, Applicant believes, as claimed, each of elements (i)-(xiii) are clearly layers of memory which are always present in the claimed invention (*See* Applicant's Original Specification, Paragraph [0008], [0009] and [0015]). Each layer is utilized in the claimed invention, in that each layer, as claimed, is available to receive data. Applicant believes the claim is not rendered indefinite by the possibility that a layer may not be utilized because the claimed invention requires each layer to be available (*See* Applicant's Original Specification, Paragraph [0025]).

Applicant respectfully requests reconsideration of this 112 rejection and of this application.

This unique combination of elements provides the advantage of not requiring the use of tedious or cumbersome standards organizations or other bodies of work, such as the Distributed Management Task Force "DMTF" and Common Information Model "CIM", to define relationships.

Applicant's invention does not use any existing network or management protocol, and instead creates a new protocol using the layering effect of the computer instructions in the data storage of the server.

Neither of these advantages has been taught or even suggested in the prior art.

The invention has: a “device adapted for manipulating data and programs” - see Claim 1 paragraph (f), as previously amended, and Claims 25 and 27, as filed (“input device” and “computer”).

a “processor with data storage”- see claims 20 and 21, as previously amended, and Claim 25, as filed (“computer”).

“device adapted for inputting data and programs” - see Claim 1 paragraph (f), as previously amended, and Claims 25 and 27, as filed (“input device”).

“device adapted for viewing data and programs” - see Claim 1 paragraph (f), as previously amended, and Claims 25 and 27, as filed (“input device” and “computer”).

“user input device” – see Claim 1 paragraph (e), as previously amended (“user interface executable on a user input device”)

“network” – see Paragraph [00040], and Figure 1 depicting a “shared network object layer and a network object layer.”

“computer instructions for...” – see Paragraphs [00025], [00028], and [00052], teaching use of software.

“dependency and impact hierarchy” – see Figure 1

This functionality of Applicant’s system uses a thirteen layer dependency/impact hierarchical model that represents individual technical infrastructure components as they relate to individual business processes. Applicant’s model considers every technical infrastructure component necessary to support any specific business activity, regardless of various or types of technology, creating a resulting hierarchy that describes inter-dependences between various technical infrastructure components, and their impact on business processes. (Applicant’s Paragraph [0008])

Evidence of licensing is a secondary consideration to overcome claims based on 35 USC Section 103 obviousness, if the licensing is of sufficient parties and of sufficient money, *see EWP Corp v. Reliance Universal, Inc* 755 F.2d 898 (Fed Cir. 1985).

Applicant has shown the claimed features were responsible for the commercial success of the system and should be accorded substantial weight, see *Ex parte Remark* 15 USPT2d 1498 (Bd. Pat. App. & Inter. 1990). If the invention was not commercially successful, BMC Software would not have taken it and used it in so many applications. As stated in the lawsuit, the use of the invention is currently occurring, repeatedly by BMC Software.

Claims 4 – 27 depend on Claim 1 and contain all the limitations thereof.
Because Applicants believe that Claim 1, as amended, is patentable over *Adler*,
Applicants also believe that Claims 4 - 27 are patentable over the art of record.

Applicants appreciate the Board's attention to this matter.

Respectfully submitted,



Date: February 26, 2009

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APPENDIX

A. Claims Section

All pending claims are set forth below :

1. (Previously Amended) A system for identifying relationships between business processes and technology using a protocol to form a dependency and impact hierarchy, wherein the system comprises:
 - a. a device adapted for manipulating data and programs comprising a processor with data storage;
 - b. a device adapted for inputting data and programs to the device adapted for manipulating data and programs,
 - c. a device adapted for viewing data and programs in communication with the device adapted for inputting data and programs;
 - d. a user input device for input of data and programs from a user;
 - e. a network in communication with the devices for inputting, viewing and manipulating data and programs; and
 - f. wherein the device adapted for manipulating data and programs comprises computer instructions for identifying relationships between business processes and technology using a protocol to form a dependency and impact hierarchy, and computer instructions for inputting data and

forming in the data storage of the device for the manipulation of data and programs all of the following:

- i. a business organization object layer;
- ii. a business unit object layer;
- iii. a business process object layer;
- iv. a mechanism object layer;
- v. a client object layer comprising an application user interface executable on the user input device;
- vi. an input device object layer;
- vii. a shared infrastructure services object layer indicating a technical service;
- viii. an application object layer;
- ix. a shared data storage object layer comprising a shared data storage technical infrastructure object;
- x. a server object layer comprising a server technical infrastructure component;
- xi. a network object layer comprising a network technical infrastructure component;
- xii. a shared network infrastructure object layer comprising an individual network object; and

- xiii. a security device object layer comprising a security device technical infrastructure component, wherein the object layers are arranged vertically creating vertical dependencies and the object layers are in a constant and static arrangement.
- 2. (Canceled)
- 3. (Canceled)
- 4. (Previously Presented) The system of claim 1, wherein relationships between object layers is constant and static.
- 5. (Previously Presented) The system of claim 1 wherein each object layer is dependent on the object layer below it.
- 6. (Previously Presented) The system of claim 1, wherein the dependency and impact hierarchy comprises of a member selected from group consisting of a business process object; a technical infrastructure component; a business process object group; a technical infrastructure component group of, and combinations thereof.
- 7. (Previously Presented) The system of claim 6, wherein the business process object is modeled above the technical infrastructure component, wherein each object layer is dependent on the object layer below it.
- 8. (Previously Presented) The system of claim 1, further comprising a recursive identification of infrastructure dependencies and a documentation of technical infrastructure objects traversing down the dependency and impact hierarchy for a specific business process.

9. (Previously Presented) The system of claim 1, further comprising a bridged common object layer consisting of a subset of object layers in the discreet dependency and impact hierarchy.
10. (Previously Presented) The system of claim 9, wherein the shared infrastructure services object layer is the bridged common object layer, wherein the bridged common object layer comprises a duplicate of the application object layer, the shared data storage object layer, the server object layer, the network object layer, the shared network infrastructure object layer, and the security device object layer.
11. (Previously Presented) The system of claim 9, wherein shared data storage object layer is the bridged common object layer, wherein the bridged common object layer comprises a duplicate of the shared infrastructure services, the application object layer, the server object layer, the network object layer, the shared network infrastructure object layer, and the security device object layer.
12. (Previously Presented) The system of claim 9, wherein the shared network infrastructure object layer is the bridged common object layer, wherein the bridged common object layer comprises a duplicate of the network object layer and the security device object layer.
13. (Previously Presented) The system of claim 1, wherein the business organization object layer is the top layer of the dependency and impact hierarchy.

14. (Previously Presented) The system of claim 1, wherein the business organization object layer comprises an individual business organization object or a group of business organization objects.
15. (Previously Presented) The system of claim 1, wherein the business unit object layer comprises an individual business unit object or a group of business unit objects.
16. (Previously Presented) The system of claim 1, wherein the business process object layer comprises an individual business process object or a group of business process objects.
17. (Previously Presented) The system of claim 1, wherein mechanism object layer comprises an individual tool or a technology that supports a specific business process.
18. (Previously Presented) The system of claim 1, wherein the technical service is selected from the group consisting of network addressing, network authentication, software distribution and combinations thereof.
19. (Previously Presented) The system of claim 1, wherein the security device object layer is the bottom layer of the dependency and impact hierarchy.
20. (Previously Presented) The system of claim 1, wherein the application object layer comprises files containing commands as program files and files that do not contain commands as data files.
21. (Previously Presented) The system of claim 20, wherein program files cause the computer to perform specific operations.

22. (Previously Presented) The system of claim 20, wherein the data files comprise a member selected from the group consisting of structured information, unstructured information, created information, accessed information, manipulated information, and combinations thereof.
23. (Previously Presented) The system of claim 20, wherein the application object layer comprises up to four dependency relationships between programs files and data files.
24. (Previously Presented) The system of claim 23, wherein the data file receive data from a second data file, wherein the data file receiving the data is modeled above and dependant upon the a second data file.
25. (Previously Presented) The system of claim 23, wherein the program file is modeled above the data file and wherein the program file reads, writes, edits, deletes, or manipulates data in the data file.
26. (Previously Presented) The system of claim 23, wherein the data file is modeled above the program file and wherein the program file reads, writes, edits, deletes, or manipulates the data file.
27. (Previously Presented) The system of claim 23, wherein the program file is modeled above a second program file and wherein the program file calls or launches the second program file.

B. Claim Support Section

Claim 1 as filed, claims 25 and 27 as filed.

C. Means or Step plus Function Analysis Section

There are no means or step plus function analysis for this case.

D. Evidence Section

No other evidence is in this case.

E. Related Cases Section

None